TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 161

ERNEST K. JAMES, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ACTING TAX COMMISSIONER FOR THE STATE OF WEST VIRGINIA, APPELLANT,

vs.

UNITED ARTISTS CORPORATION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

FILED JUNE 30, 1938.

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[fol. 1] [Caption omitted]

[fol. 2]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF WEST VIRGINIA

No. 3624. In Chancery

UNITED ARTISTS CORPORATION, a Corporation,

v.

FRED L. FOX, Individually and in His Official Capacity as Tax Commissioner of the State of West Virginia

ORDER FILING BILL OF COMPLAINT AND RESTRAINING DEFENDANT—December 17, 1936

This 17th day of December, 1936, came the plaintiff, United Artists Corporation, a corporation, by Brown, Jackson & Knight, its counsel, and tendered and showed unto the Court its verified bill of complaint praying for an injunction restraining the said defendant, Fred L. Fox, individually and as Tax Commissioner of the State of West Virginia, his agents, servants, and employees, from collecting and from attempting to collect from the plaintiff the tax assessed against the plaintiff as set out in the bill of complaint herein, or any penalties claimed to have accrued thereon, and from imposing, levying, or assessing against the plaintiff any tax measured by the income received, or to be received, by the plaintiff for the use of or for the right to exhibit motion picture films owned by it and distributed to exhibitors in West Virginia, as described in said bill of complaint, and from imposing or attempting to impose upon the plaintiff any interest or penalty on account of the failure of the plaintiff to pay any such tax, and from enforcing or attempting to enforce any penalty against the plaintiff for the non-payment of, or failure to make a return for the purpose of, any such tax.

And the said bill of complaint is ordered to be and the same is hereby filed.

And the plaintiff, by its said counsel, applied to and moved the Court for an interlocutory injunction enjoining and restraining the defendant according to the prayer of

plaintiff's bill of complaint as hereinbefore set out, and [fol. 3] also applied to and moved the Court for a temporary restraining order enjoining and restraining the defendant as aforesaid pending the action of the Court upon said application and motion for an interlocutory injunction.

And the plaintiff showed unto the Court that proper service of notice of said applications and motions has been had upon the defendant and upon the Attorney General and upon the Governor of the State of West Virginia, and tendered said notice with the returns thereon, and the same is ordered filed.

And the said defendant in person, and the Attorney General of West Virginia for said defendant and for the Governor of said State appeared and resisted the granting of the said applications and motions.

And it appearing to the Court, upon consideration of the said bill of complaint and argument of counsel for the respective parties, that the issuance of a temporary restraining order is necessary in order to prevent immediate and irreparable loss and damage to the plaintiff,

It is Adjudged, Ordered and Decreed, that the said defendant, Fred L. Fox, individually and as Tax Commissioner of the State of West Virginia, his agents, servants, and employees, be, and they are, and each of them is, hereby restrained and enjoined from collecting and from attempting to collect from the plaintiff the tax assessed against the plaintiff as set out in the bill of complaint herein, or any penalties claimed to have accrued thereon, and from imposing, levying, or assessing against the plaintiff any tax measured by the income received, or to be received by the plaintiff for the use of or for the right to exhibit motion picture films owned by it and distributed to exhibitors in West Virginia, as described in said bill of complaint, and from imposing or attempting to impose upon the plaintiff any inter- [fol. 4] est or penalty on account of the failure of the plaintiff to pay any such tax, and from enforcing or attempting to enforce any penalty against the plaintiff for the non-payment of, or failure to make a return for the purpose of, any such tax, until the hearing of the plaintiff's application and motion for an interlocutory injunction herein, and until the further order of the Court; provided that the plaintiff do forthwith give and file in this cause a surety bond in the sum of $5,000.00, with security to be approved by the Clerk

of this Court, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby, and such bond was thereupon given in open Court.

And it appearing to the Court that said bill of complaint and the application and motion of the plaintiff hereinbefore set forth seek an interlocutory injunction restraining the enforcement, operation and execution of a statute of the State of West Virginia as against the plaintiff by restraining the Tax Commissioner of said State in the enforcement or execution of such statute as against the plaintiff upon the ground of the unconstitutionality of said statute as applied to the plaintiff and its business, the Court is of opinion that there should be called to the assistance of the Judge of this Court two other Judges to hear and determine said application and motion for an interlocutory injunction pursuant to Section 266 of the Judicial Code, and it further appearing that two other Judges cannot now be conveniently called for the purpose the Court doth reserve until a future date the entry of an order setting the said application and motion for hearing.

[fol. 5] IN UNITED STATES DISTRICT COURT

[Title omitted]

BILL OF COMPLAINT—Filed December 17, 1936

To the Honorable George W. McClintic, Judge of Said Court:

The plaintiff avers and says that:

I

Plaintiff is a corporation duly organized and existing under the laws of the State of Delaware, with its principal office and chief place of business located in the City of New York in the State of New York and as such is a citizen and resident of the State of Delaware.

II

The defendant Fred L. Fox is now and was at all times hereinafter mentioned the Tax Commissioner of the State

of West Virginia, a citizen and resident of the City of Charleston, Kanawha County, West Virginia, and of the Southern District of West Virginia, and as said Tax Commissioner is charged with the duty of collecting taxes for the State of West Virginia and administering and enforcing the tax laws of the State of West Virginia.

III

This is a suit of a civil nature in equity, the controversy involved therein is wholly between citizens of different states, and the amount in controversy therein exceeds $3,000.00, exclusive of interest and costs.

IV

The plaintiff is engaged in the business of distributing motion pictures from its place of business in the State of New York to exhibitors of motion pictures in practically [fol. 6] every State of the United States, including the State of West Virginia. The Plaintiff has no place of business, office, agents, or employees in West Virginia, and owns no property in West Virginia other than such of its films as are temporarily within West Virginia, as hereinafter more fully set out. The plaintiff maintains branch offices in certain cities in the United States, including the cities of Cincinnati in the State of Ohio, Pittsburgh in the State of Pennsylvania, and Washington in the District of Columbia, but no office of any kind is maintained in the State of West Virginia. The method of doing business the plaintiff and West Virginia exhibitors is as follows: The plaintiff makes public announcement from time to time of motion pictures that it has or will have for release. Theatre owners or managers who desire to exhibit motion pictures that the plaintiff has or expects to have for distribution make written application in the form of an offer to the plaintiff at its place of business in New York, usually through the representatives of one of the three branches above named, for a certain picture or for a number of certain pictures or for a number of pictures to be selected by the exhibitor. The plaintiff, through its proper officers or representatives at its main office in the City of New York, rejects or accepts such application and offer. When such application and offer is accepted a contract is made by executing upon said application and offer an acceptance thereof in the State of New York and return-

ing said contract composed of the application and offer and said acceptance to the said exhibitor. Such contract provides that the motion picture films therein specified or to be selected as therein provided for will at the time or times specified or provided for be sent by the plaintiff to the exhibitor, who is by the contract authorized to exhibit such films for a number of days fixed by the contract, which period of time is usually for one day or for seven days or for some intermediate number of days. The contract provides that the exhibitor will pay the plaintiff for the right to ex- [fol. 7] hibit such films, which payment is sometimes fixed by the contract as a specified sum of money and sometimes as a specified percentage of the receipts from theatre admissions during the day or days when said picture is exhibited. The contract further provides that the exhibitor at the end of such period will ship said film or films by a carrier designated or used by plaintiff, to some other exhibitor, who is usually outside of the State of West Virginia, or to the said Cincinnati office of the plaintiff, or to the Pittsburgh or Washington office of the plaintiff, whichever shipped the film to the exhibitor, such shipment in any event to be at the direction of the plaintiff, and such films are always finally returned to the plaintiff in New York or at some point without the State of West Virginia. Pursuant to said contract the plaintiff sends the films from one of said branch offices without the State of West Virginia by express or parcel post or other carrier to the exhibitor in West Virginia. Such exhibitor then exhibits such films in ordinary motion picture theatres, and charges an admission fee to such of the public as desire to see such exhibition. When the use of the pictures is completed according to the contract they are reshipped on advices given by the plaintiff. Usually said contracts are sent by the New York office of the plaintiff to its said Cincinnati or Washington, D. C., or Pittsburgh office, and by said office to West Virginia exhibitors. There are a large number of exhibitors of plaintiff's films in the cities and towns of West Virginia, such films being exhibited in nearly all the counties in said State. All prints and films of the motion pictures licensed for exhibition by exhibitors in West Virginia are manufactured and made in laboratories in the State of California, and all of such prints and films are sent from California to Cincinnati, Pittsburgh, and Washington and thence to exhibitors in West Virginia. Al-

ways the contracts are made in New York, the films are produced and owned outside the State of West Virginia, and the [fol. 8] films are shipped from without the State of West Virginia into the State of West Virginia to the exhibitor and are afterwards again shipped out of the State of West Virginia, and payments by the exhibitor are sent to and received by plaintiff without the State. A true copy of a typical contract such as is hereinbefore described is attached hereto, marked for identification "Exhibit A With Bill of Complaint".

V

By Article 13 of Chapter 11 of the West Virginia Code of 1932, as amended and in effect from March 9, 1935, said Article dealing with the Business and Occupation Tax of West Virginia, it is provided that (Section 2-(h)) a tax equal to one per cent of gross income is levied upon and shall be collected from every person engaging or continuing within the State in any service business or calling not otherwise specifically taxed under said law: that (Section 2-(i)) upon every person engaging or continuing within the State of West Virginia in the business of collecting incomes from the use of real or personal property or of any interest therein, whether by lease, conveyance, or otherwise, and whether the return be in the form of rentals, royalties, fees, interest, or otherwise, the tax shall be one per cent of the gross income of any such activity; that (Section 4) taxes levied under said Article 13 shall be payable in quarterly installments on or before the expiration of thirty days from the end of the quarter in which they accrue, and the taxpayer shall within thirty days from the expiration of each quarter make out an estimate of the tax for which he is liable for such quarter, verify the same by oath and mail the same, together with a remittance in the form required, to the office of the defendant; that (Section 5) on or before thirty days after the end of the tax year each person liable for the payment of any such tax shall make a return showing the gross proceeds of sales or gross income of business, compute the amount of tax chargeable against him in accordance with the provisions of said Article, deduct the amount of quarterly payments, if any, and transmit with his report a remittance in [fol. 9] the required form covering the residue of the tax chargeable against him to the defendant.

Said Article further provides that (Section 7) if any person fail or refuse to make return, or if the Tax Commissioner has reasonable ground to believe that any return made is so deficient as not to form the basis of a satisfactory assessment of tax, the Tax Commissioner may proceed as he deems best to obtain information on which to base the assessment of the tax, shall assess the tax and notify the person assessed of the amount of the tax; and the assessment of the tax by the Tax Commissioner shall be final as to any person who refused to make a return.

Said Article further provides that (Section 8) any person, having made the return and paid the tax as provided therein, who feels aggrieved by the assessment made upon him, may apply to the Board of Public Works within thirty days after notice is mailed to him by the Tax Commissioner for a hearing and correction of the amount of the tax so assessed against him, said Board may grant or deny such hearing, and upon a hearing, if granted, may make such order as shall appear to it just and lawful; any person improperly charged with any tax and required to pay the same may recover the amount paid, together with interest, in any proper action or suit against the Tax Commissioner, and the Circuit Court of the County in which the taxpayer resides or is located shall have original jurisdiction of any such action and shall adjudge costs to such extent and in such manner as may be deemed equitable, and upon presentation of a certified copy of a judgment in any such action the Auditor of the State of West Virginia shall issue his warrant upon any funds in the State Treasury available for the payment thereof; no injunction shall be awarded to restrain the collection of taxes imposed thereby except upon the ground that the assessment thereof was in violation of the Constitution of the United States or the Constitution of the State of West Virginia, or that the same [fol. 10] were fraudulently assessed, or that there was a mistake made in the amount of taxes assessed upon such person, and in the latter case the bill must show an application to the Board of Public Works for the correction of the assessment and the payment into the treasury of all taxes appearing by the bill of complaint to be owing.

Said Article further provides that (Section 9) the assessment of taxes and the returns required shall be for the year ending on the 31st day of December, but if a taxpayer

keeps books reflecting his business on a basis other than the calendar year, he may, with the assent of the Tax Commissioner, make annual returns and pay taxes for the year covering his accounting period; that (Section 11) all remittances of taxes imposed thereby shall be made to the Tax Commissioner and he shall pay the moneys into the state treasury to be kept and accounted for as provided by law; that (Section 12) a tax due and unpaid thereunder shall be a debt due the State and a lien upon the property used in the business or occupation upon which it is imposed, such lien shall have the same priority as the lien of the general property tax, a penalty of five per cent shall be added for any default for thirty days or less, and for each succeeding thirty days of such default there shall be added an additional penalty of one per cent; that (Section 13) the Tax Commissioner may collect taxes due and unpaid thereunder, together with all accrued penalties, by an action in assumpsit, motion for judgment, or other appropriate proceeding in the Circuit Court of the County in which the privilege taxed has been exercised; and in the event of default in payment of the tax for sixty days after the same shall be due, the Tax Commissioner may proceed in the Circuit Court of the County in which the privilege taxed has been exercised to obtain an injunction restraining the further exercise of the privilege until full payment of all taxes and penalties due under said Article; that (Section 20) the Tax Commissioner may distrain upon any goods, [fol. 11] chattels, or intangibles represented by negotiable evidences of indebtedness of any tax payer delinquent under said Article for the amount of all taxes and penalties accrued and unpaid thereunder, and he is authorized to require the assistance of the sheriff of any County of the State in levying such distress in the County of which such sheriff is an officer.

Said Article further provides that (Section 21) it shall be unlawful, under penalty of a fine not exceeding one thousand dollars and imprisonment not exceeding one year, for any person to refuse to make the return provided for therein, or make any false or fraudulent return or false statement in any return with intent to defraud the State or to evade the payment of the tax or any part thereof imposed thereby, or for any person to aid or abet another in any attempt to evade the payment of such tax, or for an officer of any corporation to make or permit to be made for any cor-

poration any false return or false statement in any return required thereby, with intent to evade the payment of any tax thereunder.

Chapter 1 of the Acts of the Extraordinary Session of the Legislature of West Virginia, effective July 1, 1925, imposed (Section 2-(g)) a tax of three-tenths of one per cent of the gross income of any business not included in businesses enumerated in the statute, and this provision became Section 2-(g) of said Article 13 of Chapter 11 of the West Virginia Code of 1932, and pursuant to amendment made by Chapter 33 of the Acts of the Legislature of 1933, effective May 26, 1933, the substance of said provision became Section 2-(h) of said Article 13 as now in effect, with an increase of the tax imposed to one per cent of the gross income of any such business. And under each such statute or provision of the Code an assessment of tax by the Tax Commissioner was final, as to any person who had failed or refused to make a return for the purposes of the tax. And plaintiff is advised that the defendant claims the right to impose taxes upon the plaintiff under the said provisions [fol. 12] of the said statute of 1925, and under the provision of said Section 2-(h) of said Article 13 of Chapter 11 of said Code as well as under the provisions of said Section 2-(i) of said Article 13.

VI

Plaintiff, having been advised that by reason of the facts hereinbefore set forth it is not liable to the payment of the tax, imposed by the provisions of the West Virginia Code of 1932 as amended and now in effect, upon persons engaging or continuing within said State in the business of collecting incomes from the use of real or personal property, or of any interest therein, and having also been advised that it was not liable to the payment of any tax imposed by any previous statute upon persons engaging in business of any kind within said state, plaintiff has never made any of the estimates, reports or returns required by said Code of West Virginia, as amended and now in effect, or by any previous statute to be made by persons engaged in business in West Virginia. Nevertheless, acting under color of the provisions of said Code hereinbefore mentioned, and it may be under color of the provisions of said Act of 1925, the defendant as the Tax Commissioner of West Virginia claims

the right to collect a tax of one per cent of the gross proceeds of all amounts collected and received by the plaintiff from motion picture exhibitions in West Virginia, whether such amounts so collected are in the form of fixed charges or in the form of percentages, and has wrongly and unlawfully made an assessment of such tax against the plaintiff amounting to $4,402.19 as of October 1, 1936. Said assessment was made without notice to plaintiff and without a hearing and plaintiff is not advised upon what information defendant made such assessment nor the period for which the said tax was assessed. Pursuant to such claim the defendant has demanded that plaintiff pay to him the said sum as a tax which he alleges has already accrued as aforesaid and further that the plaintiff pay said tax upon all such sums as it may receive in West Virginia from exhibi- [fol. 13] tors of its films after October 1, 1936, and the defendant threatens to, and unless restrained as hereinafter prayed, will, assess further taxes against the plaintiff upon such income received by it subsequent to October 1, 1936. And the defendant has threatened and now threatens to undertake to enforce the collection of the amount of the tax unlawfully assessed as aforesaid with all accrued penalties and those to accrue, and for the purpose to bring against the plaintiff actions at law in the counties, or some of them, in which plaintiff's films have been and from time to time are being shown, and in such actions to sue out attachments and to make the exhibitors of plaintiff's films garnishees thereunder, and to distrain plaintiff's films in the possession from time to time of exhibitors in the State of West Virginia, and if plaintiff shall refuse for sixty days to pay the amount of the tax unlawfully assessed as aforesaid to institute a suit or suits in chancery in the Circuit Courts of the Counties in which the plaintiff's films have been and from time to time are being shown, or in some of them, for an injunction to restrain the further showing of such films until full payment shall have been made of all taxes and penalties claimed by the defendant to be due as aforesaid. And the defendant threatens to repeat and continue such suits and attachments until he has collected from the plaintiff all such sums as he claims to be now due as aforesaid and as he may hereafter claim to be due by reason of any taxes hereafter assessed against the plaintiff under

color of law as aforesaid. And the said defendant has advised certain of the exhibitors to whom the plaintiff distributes films in West Virginia of his said intentions and threatens to harass and annoy, and to continue harassing and annoying, such exhibitors by the service of notices of garnishment upon them, by seizing under distraint films in their hands from time to time and by enjoining the showing of plaintiff's films by such exhibitors until the plaintiff has paid the said taxes heretofore unlawfully assessed and any taxes against the plaintiff which said Tax Commissioner may hereafter assess under color of law as afore- [fol. 14] said. The sums of money due the plaintiff from time to time from the respective exhibitors in the State of West Virginia are such that to collect the tax heretofore unlawfully assessed and now claimed to be due as aforesaid, it will be necessary to levy successive attachments and serve notice of garnishment, or to levy successive distraint warrants, upon the same exhibitor, or to levy such attachments and serve such notices or levy such distraint warrants upon a large number of said exhibitors, and that the considerable number of attachments or distraints necessary for the collection of the amount of said tax heretofore unlawfully assessed, payment of which is now demanded, and of the said taxes which may hereafter be assessed and payment thereof demanded, will result in a multiplicity of suits. The defendant's threats to sue out such attachments, levy such distraints and seek such injunctions have annoyed and harassed, and will continue to annoy and harass, the exhibitors to whom the plaintiff distributes its films; and the garnisheeing of exhibitors, to whom plaintiff has distributed its films and the seizure under attachment or distraint of said films in the possession of exhibitors will further annoy and harass such exhibitors; all of which will tend to induce such exhibitors to turn to other distributors for films to exhibit. And plaintiff is informed, believes, and avers that the defendant will continue such threats and take such actions and proceedings to enforce payment of the said tax unlawfully assessed and other taxes to be likewise unlawfully assessed, together with the penalties accrued and to accrue, unless restrained and enjoined as hereinafter prayed, all to the immediate and irreparable damage and injury of the plaintiff and its business.

VII

Under the provisions of Section 7 of Article 13 of Chapter 11 of the said Code and under the previous statutes hereinbefore mentioned the assessment made by the defendant against the plaintiff as aforesaid is final, and there is no administrative procedure whereby the plaintiff may seek to have the assessment corrected or annulled. And [fol. 15] the plaintiff has no adequate remedy at law for its protection or redress in the premises, since the action or suit which Section 8 of said Article 13 provides may be brought against the Tax Commissioner to recover taxes improperly charged and paid is in fact a suit against the State, must be brought in a Circuit Court of the State of West Virginia, and may not be brought in a District Court of the United States, nor without paying the amount of the tax unlawfully assessed before instituting such action.

VIII

(a) The plaintiff never has been and is not now engaged within the State of West Virginia in the business of collecting incomes from the use of real or personal property or of any interest therein, whether by lease, conveyance, or otherwise, and has never been and is not now engaged in any business in the State of West Virginia, all of its business having been conducted wholly without said State of West Virginia, as hereinbefore set out.

(b) The business and activities of the plaintiff upon which the defendant is attempting to levy a tax are conducted solely in interstate commerce. The tax sought to be levied and imposed as aforesaid constitutes and is an undue burden and hindrance upon interstate commerce, in violation of the Constitution of the United States. In so far as said Article 13 and the previous statutes hereinbefore mentioned profess or undertake to impose a tax computed upon income of the plaintiff derived as aforesaid, they constitute, and each of them constitutes and causes, an unlawful exaction on income derived from interstate commerce and imposes an undue burden and hindrance upon interstate commerce in violation of the Constitution of the United States, and are particularly contrary and repugnant to Section 8 of Article I thereof, and to that extent the said laws are and each of them is void. And the said claims, demands, assessments, and threatened acts of

the defendant likewise constitute a like burden upon interstate commerce.

[fol. 16] (c) The provisions of Article 13 of Chapter 11 of the said Code of West Virginia as amended and now in effect and of the previous statutes hereinbefore referred to, denying to plaintiff any remedy or right of redress against the tax assessment unlawfully made by the defendant as aforesaid, except upon the payment of such assessment and the institution of an action or suit in a Circuit Court of the State of West Virginia against the Tax Commissioner as a nominal defendant, but in reality against the State of West Virginia, and which cannot be brought in a court of the United States, would deprive the plaintiff of its property without due process of law and deny to it the equal protection of the laws in contravention of the Fifth and Fourteenth Amendments to the Constitution of the United States.

Wherefore, inasmuch as the plaintiff is without adequate remedy save in a court of equity, the plaintiff prays:

1. That the defendant, Fred L. Fox, individually and as Tax Commissioner of the State of West Virginia, his agents, servants, and employees be restrained and enjoined from collecting and from attempting to collect from the plaintiff the tax assessed against the plaintiff as hereinbefore set forth and any penalties claimed to have accrued or hereafter to accrue thereon; from imposing, levying, or assessing against the plaintiff any tax measured by the income received, or to be received, by the plaintiff for the use of or for the right to exhibit motion picture films owned by the plaintiff and distributed to exhibitors in West Virginia, as hereinbefore set forth, under and pursuant to Article 13 of Chapter 11 of the West Virginia Code of 1932 as amended and now in effect or under any previous statute of West Virginia imposing a tax upon the privilege of doing business in West Virginia; from imposing or attempting to impose upon the plaintiff any interest or penalty on account of the failure of the plaintiff to pay any such tax; and from hereafter enforcing or attempting to enforce any penalty against [fol. 17] the plaintiff for the non-payment of, or failure to make a return for the purpose of, said tax.

2. That a preliminary injunction be granted to the plaintiff restraining and enjoining the defendant as hereinbefore prayed until the final hearing of this case, or the further

order of the Court herein, and that a temporary restraining order may be granted pending the hearing of plaintiff's motion for such preliminary injunction.

3. That the plaintiff may have such other, further, and general relief as plaintiff's case may require and the Court may see fit to grant.

United Artists Corporation, a Corporation, by Counsel. R. G. Kelly, E. W. Knight, Brown, Jackson & Knight, Solicitors.

Duly sworn to by R. G. Kelly. Jurat omitted in printing.

(Here follow two photolithographs, side folios 18 and 19)

EXHIBIT A WITH BILL OF COMPLAINT

Form 220A—12-35-U

EXHIBITOR'S COPY Made in U.S.A.

United Artists Corporation

CONTRACT

for

ONE SINGLE FEATURE MOTION PICTURE

Exchange .....

Salesman .....

Cont. No. .....

Dated .....

Form 41 No. .....

SIXTEENTH: The following SCHEDULE and all the written and printed parts thereof are a part of this license:

1. Picture .....
2. Star or Producer .....
3. Theatre .....
4. Exhibitor .....
5. Town .....
6. Zone ..... 7. Run .....
8. Consecutive Dates or Days .....
9. Clearance .....

.....

10. The Exhibitor agrees to pay as a license fee either A, B or C—

A.—Flat rental $.....

B.—Guarantee and Percentage $.....

C.—Percentage .....

And Sound Recording Fees $.....

The Exhibitor agrees to adhere, in its newspaper advertising and publicity, to the instructions issued to the Exhibitor by the United Artists Corporation.

Exhibitor agrees to charge as minimum admission to theatre—

Matinee. Adults .....Children.....

After 5 P.M. " ..... " .....

12. Special Arrangements.

WAIVER—
SEVENTEENTH: A waiver by either party of any breach or default of the other party shall not be construed as a waiver of any other or subsequent breach or default of such other party.

VERBAL PROMISES; CHANGES MUST BE IN WRITING—
EIGHTEENTH: This license agreement is complete, and all promises, representations, understandings and agreements in reference thereto have been expressed herein. No change, modification or assignment hereof shall be binding upon the distributor unless in writing signed by an officer or any person duly authorized by the Distributor in its main office in New York City.

The right of the Distributor to approve or reject this application or any other application signed by the Exhibitor at the same time or at any other time is not dependent upon the approval or rejection by the Distributor of this application or of any other application.

IN WITNESS WHEREOF, the Exhibitor has on the.....day of.....19 , executed this application, which upon acceptance by the Distributor at his home office in New York ..... signature of the proper officers shall constitute a contract of license for the exhibition of the motion picture specified in the schedule, but

WAIVER—
SEVENTEENTH: A waiver by either party of any breach or default by the other party shall not be construed as a waiver of any other or subsequent breach or default of such other party.

VERBAL PROMISES; CHANGES MUST BE IN WRITING—
EIGHTEENTH: This license agreement is complete, and all promises, representations, understandings and agreements in reference thereto have been expressed herein. No change, modification or assignment hereof shall be binding upon the distributor unless in writing signed by an officer or any person duly authorized by the Distributor in its main office in New York City.
The right of the Distributor to approve or reject this application or any other application signed by the Exhibitor at the same time or at any other time is not dependent upon the approval or rejection by the Distributor of this application or of any other application.

IN WITNESS WHEREOF, the Exhibitor has on the.....day of.....19 , executed this application, which upon acceptance by the Distributor at his home office in New York City by its affixing hereto the facsimile or perforated or written signature of the proper officers, shall constitute a contract of license for the exhibition of the motion picture specified in the schedule, but only at the theatre and on the dates specified herein and in accordance with the terms and conditions hereof.

Dated the.....day of

.....19 8....

ACCEPTED at New York, N. Y.

UNITED ARTISTS CORPORATION

By.....
General Manager of Distribution

Exhibitor .....L.S.
An Individual—A Partnership—A Corporation
(Strike out two)

Lessee
Owner (Strike out two)
Operator

By .....
Partner—General Manager—Officer
(Strike out two)

Guaranteed By

.....

END OF CONTRACT.

BEGINNING OF THE

CONTRACT OF LICENSE

Upon the acceptance by the distributor at its home office in New York City the following shall constitute the contract of license.

LICENSE—
FIRST: The DISTRIBUTOR grants and the EXHIBITOR accepts a limited license under the **copyright** of the motion picture specified in the schedule and a license for use of the sound recorded therewith to exhibit publicly said motion picture and to reproduce publicly such recorded sound in synchronism therewith by use of the positive print delivered to the Exhibitor by the Distributor on the dates set in accordance with the terms hereof and specified or confirmed by the Distributor in writing. Said license does not include exhibition prior to 8 a. m. of the first date of exhibition.

MUSIC—
SECOND: If copyrighted musical compositions are included in such recorded sound, the exhibitor warrants to have at the date of exhibition a license to perform publicly such music from the copyright proprietor thereof.

PAYMENT—
THIRD. (a) The Exhibitor agrees to pay to the Distributor the license fee in the Schedule set forth at least 7 days in advance of the fixed day of the exhibition as such days are fixed in the Schedule or in accordance with ARTICLE SEVENTH hereof. **Any and all payments to be made hereunder shall be payable to the Distributor at the city in which is located the Exchange from which the Exhibitor is served.**

PAYMENT UPON PERCENTAGE BASIS—TRUST FUNDS
(b) If any part of the license fee of said motion picture shall be computed upon the exhibitor's gross receipts, such payment or part thereof shall be made to the distributor at the end of each days exhibition together with a correct itemized statement of the gross receipts of said theatre for admission thereto upon the exhibition date or dates of said motion picture for which payment is so required to be made, signed by the Exhibitor or the Exhibitor's Manager and the Exhibitor's cashier or treasurer. Should the distributor so require, such itemized statement shall be made upon forms furnished by the distributor. Upon said date or dates an authorized representative of the distributor is hereby given the right to verify the sale of all tickets of admission to said theatre, and the receipts therefrom, and for such purpose shall have access to the theatre, including the box office, and also the right to examine the exhibitor's books and records relating to such gross receipts. The distributor, or its authorized representative, also shall have access for a period of one (1) year after the receipt by the distributor of each final box office statement, to all of the exhibitor's books and records for the purpose of verifying such box office statement. The distributor agrees that any information obtained pursuant to the provisions of this Clause will be treated as confidential, excepting in any arbitration proceeding, or litigation in respect to this license. The Exhibitor further agrees to segregate the Distributor's share of the gross receipts as such admission moneys are paid into the box office and not to intermingle such funds with any other moneys and to hold such percentage share of such gross receipts in trust for the Distributor and to pay over such trust funds daily as in this paragraph provided, it being intended that the Distributor's share of the gross receipts shall be exclusively the property of the Distributor from the moment it is paid into the box office.

LIQUIDATED DAMAGES FOR BREACH—
FOURTH: **1. If Licensed Upon a Flat Fee.** The Exhibitor recognizes and agrees that the damage suffered by the distributor, if the exhibitor fails to exhibit and/or pay for the aforesaid motion picture is the license fee specified in the schedule above.
2. If Licensed Upon a Percentage Basis. If payment hereunder of the license fee of said motion picture shall be computed either in whole or in part, upon a percentage of the gross admission receipts of said theatre, and if the Exhibitor fails or refuses to exhibit such motion picture as herein provided, the Exhibitor shall pay to the Distributor as liquidated damages for each day that the Exhibitor fails or refuses to exhibit such motion picture, a sum equal to such percentage of the average daily gross receipts in such theatre during the period of thirty (30) operating days to wit, the sixteen (16) operating days immediately prior to and the fourteen (14) days immediately after but including the date of the mailing of the notice of availability as set forth in ARTICLE SEVENTH Subdivision (2) and in addition any fixed sums payable hereunder in respect thereto. If the Exhibitor shall exhibit such motion picture for less than the full number of days provided for in this license the sum equal to such percentage shall be computed, upon a sum equal to seventy-five per cent (75%) of the gross receipts of said theatre during the last day of the exhibition thereat of such motion picture. A sworn statement of the said daily gross receipts shall be delivered by the Exhibitor to the Distributor upon demand therefor.

DELIVERY OF PRINTS—
FIFTH: (1) The Distributor shall deliver a print of 2,000-foot reels or less in length to be at the option of the Distributor in physical condition for the exhibition contemplated herein.
(2) Delivery to the Exhibitor or the Exhibitor's authorized agent by delivery at the Distributor's Exchange, or to a common carrier, or to the United States Postal authorities, shall constitute delivery for all purposes under the terms of this agreement. Any delivery to a carrier shall be made in accordance with the carrier's delivery schedule in time to reach the place where the said theatre is located at least one hour before the usual time for the opening of said theatre.

ROAD SHOW—
SIXTH: A road show is solely under the control of the producer and is not a general release and the producer does not deliver the picture to the distributor for general release until the completion of any such road shows. Thus said motion picture will become available to the Distributor for distribution only upon the completion of any such road show. However, the Distributor agrees that should the motion picture be "road shown" in the immediate vicinity of the Exhibitor's theatre, in the same zone, as that word is understood in motion picture parlance, this contract for the exhibition of said motion picture may, at the option of either party, be cancelled by written notice given to the other party within 15 days after the commencement date of such roadshow. Otherwise this agreement remains in full force and effect.

FIXING EXHIBITION DATES—
SEVENTH: The exhibition date or dates of such motion picture, unless definitely specified or otherwise provided for in the Schedule, or otherwise agreed upon in writing, shall be as follows:
(1) This contract contemplates the general release of the said picture within the eighteen (18) months next succeeding the date of the execution of this contract. Should the producer not deliver the picture to the distributor, therefore, so that the distributor can generally release it by that date, this contract of license shall be mutually cancelled on that date.
(2) Within a reasonable time after the delivery by the producer, and provided the exhibitor is not in default hereunder, or under any other contract with the distributor, the distributor agrees to mail to the exhibitor a notice in writing of the date when such motion picture will be available for exhibition by the Exhibitor, such date being hereinafter referred to as the available date. Such notice shall be mailed to the exhibitor at least fifteen days prior to the available date therein specified.
(3) The Exhibitor shall, within fourteen days after the mailing of such notice, select the exhibition date or dates, such dates to be within the period commencing with the available date and ending thirty days thereafter, by giving to the Distributor written notice of the date or dates so selected. If the exhibition date or dates so selected by the Exhibitor are not open to the Exhibitor, the Distributor shall so notify the Exhibitor, and in such event the exhibition date or dates shall be as provided in the following paragraphs (a) and (b):

EXHIBIT A WITH BILL OF COMPLAINT

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(a) If other dates within the same period are open, the Distributor shall notify the Exhibitor thereof, and the Exhibitor agrees immediately to select from such open dates another date or dates. Should the Exhibitor fail so to do, the Distributor may, at its option, either declare the contract to be in default, or designate in writing such date or dates within the period beginning not earlier than two weeks and ending not later than six weeks from the date first selected by the Exhibitor, and written notice thereof shall be given or mailed to the Exhibitor fourteen days before the date so designated by the Distributor. The Exhibitor must immediately confirm such dates to the Distributor, and should the Exhibitor not confirm the date so designated, the Exhibitor shall be in default under this contract.

(b) If no other dates within the said thirty days are open, then the Exhibitor shall designate the date or dates which shall be within the period beginning not earlier than two weeks, and ending not later than six weeks from the last day of the said thirty days, and written notice thereof shall immediately be given or mailed to the Distributor by the Exhibitor. If the Exhibitor fails to so designate such date or dates, then the Distributor may, at its option, either declare the contract to be in default, or designate in writing such date or dates within the period beginning not earlier than two weeks and ending not later than six weeks from the date first selected by the Exhibitor, and written notice thereof shall be given or mailed to the Exhibitor fourteen days before the date so designated by the Distributor. The Exhibitor must immediately confirm such dates to the Distributor, and should the Exhibitor not confirm the date so designated, the Exhibitor shall be in default under this contract.

(4) In the event of the Exhibitor failing to designate exhibition date or dates of such motion picture as in this contract provided, or should the Exhibitor default in any other contract he has with the Distributor, then and thereupon any sum or sums of money and other fixed consideration shall become due and payable by the Exhibitor to the Distributor, anything to the contrary in this contract notwithstanding, and the clearance period in respect to such motion picture provided in this agreement, shall be deemed revoked; and if payment hereunder of the license fee of said motion picture is to be computed in whole or in part upon percentage of the gross admission receipts of said theatre, damages shall be computed as agreed upon in paragraph Fourth, subdivision (2), from the last day of the fourteen days after the mailing of the notice of availability as set forth in paragraph Seventh, subdivision (2) above.

(5) The date or dates fixed or determined as in this Article provided shall be for all purposes the exhibition date or dates of such motion picture as though set forth in the Schedule before execution hereof by the Exhibitor.

(6) The exhibitor is cognizant that the Distributor is bound by contract to cause the motion pictures distributed by it to be exhibited in the several exchange territories in sequence of the general release of such pictures in each respective exchange territory. Therefore, pursuant thereto, the Exhibitor agrees to exhibit each motion picture for the license of which it contracts with the Distributor in the sequence of the notices of availability given the Exhibitor by the Distributor, and that this order of exhibition shall be of the essence of this and the other license agreements entered into by the parties hereto.

RETURN OF PRINTS BY EXHIBITOR—

EIGHTH: (a) After the last exhibition on the last date of the period of this license, the Exhibitor agrees promptly as instructed in writing by the Distributor, either to return such prints to the Distributors' Exchange, or to deliver the same to a carrier designated by the Distributor, or to deliver such print to another exhibitor, and in any case to pay all transportation charges therefor adequately valued and insured.

(b) In the event the Exhibitor is obligated by such written instructions to deliver said print to another exhibitor, and fails so to do, and the Distributor is damaged thereby, the Exhibitor agrees to pay any and all such damages.

LOSS OF OR DAMAGE TO PRINTS—

NINTH: (a) The Exhibitor shall immediately notify the Distributors' Exchange by telegram of the loss, theft or destruction of or damage to any print between the delivery to and the return thereof by the Exhibitor, and in such event, the Exhibitor agrees to pay to the Distributor a sum equal to the cost of replacement for each lineal foot thereof.

(b) The Exhibitor agrees that all claims by him on account of the condition or of the late or non-arrival of a print shall be barred hereunder unless such claim shall be made by telegram, setting forth fully the condition complained of, within twenty-four hours after the exhibition date determined hereunder.

CHANGE OF TITLE—

TENTH: The Distributor shall have and hereby reserves the right in its sole discretion to change the title of the motion picture specified in the Schedule, to change any story, book or play, to make any change in or adaptation thereof and to change the cast or any member and the director of any thereof excepting the director of a picture described in the Schedule as the motion picture of a particular director.

CUTTING OR ALTERATION OF PRINTS—

ELEVENTH: The exhibitor shall exhibit each picture in its entirety and shall not copy, duplicate, subrent or part with possession of any print thereof nor shall the exhibitor cut or alter the same, excepting to make necessary repairs thereto, or when required by any duly authorized public official or authority or with the written or telegraphic consent of the distributor, and the exhibitor shall return each print in the same condition as received, reasonable wear only excepted.

CLEARANCE AND RUN—

TWELFTH: (a) Provided the Exhibitor is not in default hereunder, the Exhibitor agrees to observe the Clearance specified in the schedule hereof.

(b) If the Exhibitor is granted hereunder a second or subsequent run, the Distributor shall have the right in its sole discretion to advance the Exhibitor's run by giving notice in writing to such effect to the Exhibitor, and the Exhibitor agrees to exhibit such motion picture in accordance therewith, even though the Exhibitor's run thus becomes a first run and there are no runs prior thereto.

ADVERTISING PRIOR TO FIRST RUN—

THIRTEENTH: If the Exhibitor is granted hereunder a second or subsequent run, the Exhibitor agrees not to advertise the said picture except by means of advertisements inside the said theatre not intended for removal therefrom by the public, prior to the exhibition of this picture by any other exhibitor having the right to the first or prior run hereof. In the event of any violation of this clause the Exhibitor agrees to pay to the Distributor a sum equal to the damage, if any, so caused such other Exhibitor, and the Distributor may, at its option, terminate the license granted hereunder. The Distributor, however, shall not be liable for any breach of the provisions of this article caused by any other exhibitor.

TAXES—

FOURTEENTH: The exhibitor shall pay to the distributor upon demand, any tax, fee or other like charge now and/or hereafter imposed upon the delivery, and/or the exhibition of prints of motion pictures and/or upon the sums payable under this license by the exhibitor to the Distributor.

IMPOSSIBILITY OF PERFORMANCE—

FIFTEENTH: Neither party shall be liable *unto the other for a default caused by force majeur.*

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[fol. 20] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF INTENTION TO APPLY FOR INTERLOCUTORY INJUNCTION AND TEMPORARY RESTRAINING ORDER—Filed December 17, 1936

To His Excellency the Governor of West Virginia:

To the Honorable the Attorney General of West Virginia:

To Fred L. Fox, Individually and in His Official Capacity as Tax Commissioner of the State of West Virginia:

You will please take notice that, on the verified bill of complaint to be filed herein, a copy of which is served upon you with this notice, the undersigned United Artists Corporation, a corporation, will apply to the United States District Court for the Southern District of West Virginia, at Charleston, at 9:15 A. M. on December 17, 1936, for an interlocutory injunction enjoining and restraining the defendant according to the prayer of said bill of complaint, and that the undersigned will also apply to said Court at said time and place for a temporary restraining order enjoining and restraining the defendant as aforesaid.

Dated at Charleston, West Virginia, this the 11th day of December, 1936.

United Artists Corporation, by Counsel. Brown, Jackson & Knight, Solicitors.

Service of the within notice is accepted this 11th day of December, 1936.

Fred L. Fox, Fred L. Fox, Individually and in His [fol. 21] Official Capacity as Tax Commissioner of the State of West Virginia. Homer A. Holt, Attorney General of West Virginia. H. G. Kump, Governor of West Virginia.

[fol. 22] IN UNITED STATES DISTRICT COURT

SUBPOENA IN EQUITY

UNITED STATES OF AMERICA,
Southern District of West Virginia, ss:

The President of the United States of America to the Marshal of the Southern District of West Virginia, Greeting:

You are hereby commanded to summon Fred L. Fox, individually and in his official capacity as Tax Commissioner of the State of West Virginia, a citizen of and resident in West Virginia, if he be found in your District, to be and appear in the District Court of the United States for the Southern District of West Virginia, aforesaid, in the Clerk's office of said Court, at Charleston, on the 6th day of January, 1937, to answer a certain Bill in Equity, filed and exhibited in said Court against him by United Artists Corporation, a corporation, a citizen of and resident in the State of Delaware.

Hereof you are not to fail under the penalty of the law thence ensuing, and have you then and there this writ.

Witness the Honorable George W. McClintic, Judge of the District Court of the United States for the Southern District of West Virginia, this 17th day of December, 1936, and in the 161st year of the Independence of the United States of America.

Attest: Ira H. Mottesheard, Clerk, D. C. U. S., S. D. W. Va. (Seal.)

Memorandum

The said defendant is required to file an answer or other defense in this suit in the Clerk's office of said Court, on or before the twentieth day after service, excluding the day thereof; otherwise the said bill may be taken pro Confesso.

Ira H. Mottesheard, Clerk. (Seal.)

[fol. 23] MARSHAL'S RETURN ON SUBPOENA IN EQUITY

Received this writ at Charleston, West Virginia, on the 1[illegible]th day of December, 1936, and served the same upon J. F.

Bouchelle, Attorney-at-Law, who accept- service for and on behalf of Fred L. Fox, individually and as State Tax Commissioner for the State of West Virginia, by delivering to him in person on that day a true copy of the same at Charleston, Kanawha County, West Virginia.

George P. Alderson, United States Marshal, by J. F. Hoffman, Deputy.

[fols. 24-25] Bond on injunction for $5,000.00, approved and filed December 17, 1936, omitted in printing.

[fol. 26] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TIME—January 5, 1937

This day came the parties to the above styled action and the defendant, by counsel, asking leave for additional time in which to file his answer and by agreement of counsel and by leave of the Court it is adjudged, ordered and decreed that the time in which the defendant may file his answer is extended to February 2, 1937.

[fol. 27] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER SUBSTITUTING PARTY DEFENDANT—February 10, 1937

This day came the plaintiff, by counsel, and showed to the Court that Fred L. Fox, the defendant in this case, resigned as the State Tax Commissioner of West Virginia and ceased to hold such office on December 31, 1936, and that Ernest K. James was appointed to and entered upon the duties of the office of Acting State Tax Commissioner of West Virginia on January 1, 1937, and that the said Ernest K. James now holds that office and is the successor to the said Fred L. Fox in every way affecting this cause; and the said plaintiff by counsel applied to and moved the Court to permit this cause to be continued and maintained

by the plaintiff against the said Ernest K. James as aforesaid. And it appearing to the Court that there is a substantial need for so continuing and maintaining this cause and obtaining an adjudication of the questions involved herein, and that the said Ernest K. James has been given reasonable notice of said application and motion, and no objection being made and none appearing to the Court, the said application and motion is granted, and it is ordered that this cause be and the same is continued and maintained by the said plaintiff, United Artists Corporation, a corporation, against Ernest K. James, individually and in his official capacity as Acting Tax Commissioner of the State of West Virginia. And the said Ernest K. James is substituted in this cause as the defendant herein for and in the place of said Fred L. Fox.

And the said defendant Ernest K. James appeared by the Attorney General of the State of West Virginia and asked that the time allowed to the defendant in which to [fol. 28] answer the bill of complaint filed herein be extended to February 15, 1937, and the plaintiff not objecting to such request, such time is so extended.

[fol. 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FILING MOTIONS AND ANSWER—February 15, 1937

This day came the defendant, Ernest K. James, individually, and in his official capacity as Acting Tax Commissioner of the State of West Virginia, by counsel, appearing specially and for the purpose only of tendering and asking leave to file his written motion designated "Motion of Ernest K. James, individually, and in his official capacity as Acting Tax Commissioner of the State of West Virginia, to Dismiss Plaintiff's Bill of Complaint", and his written motion designated "Defendant's Motion to Dismiss Plaintiff's Bill of Complaint", and his written answer to the bill of complaint filed herein, the same being designated "The Answer of the Defendant, Ernest K. James, Individually, and in his official capacity as Acting Tax Commissioner of the State of West Virginia"; and it appearing to the Court that an order was entered on a former

day in this cause extending the time for making answer to the plaintiff's bill of complaint herein until the 15th day of February, 1937, but it having been agreed by counsel for the parties herein that no advantage would be taken of the failure of defendant to file the same on the date last aforesaid if the same should be filed at this time.

It is, therefore, ordered by the Court that the "Motion of Ernest K. James, Individually and in his Official Capacity as Acting Tax Commissioner of the State of West Virginia, to Dismiss Plaintiff's Bill of Complaint", and "Defendant's Motion to Dismiss Plaintiff's Bill of Complaint", and "The [fol. 30] Answer of the Defendant, Ernest K. James, Individually, and in his official capacity as Acting Tax Commissioner of the State of West Virginia", be and the same are hereby filed now as of the 15th day of February, 1937.

[fol. 31] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION OF ERNEST K. JAMES, INDIVIDUALLY, ETC., TO DISMISS BILL OF COMPLAINT—Filed February 15, 1937

Now comes Ernest K. James, individually and in his official capacity as Acting Tax Commissioner of the State of West Virginia, and moves to dismiss the above entitled suit and to dismiss plaintiff's bill of complaint upon the following grounds:

I

The said bill of complaint shows clearly upon its face that the defendant, Ernest K. James, individually, has no personal interest in the privilege tax of the State of West Virginia, which is complained about in plaintiff's bill of complaint; but that it clearly appears from the allegations in said bill that the interest in said tax is in the public represented by the government of the State of West Virginia, who is the adverse claimant with respect to said tax, but who has not been made a party to this suit and who has not consented to be sued herein.

II

The said bill of complaint clearly shows that the defendant, Ernest K. James, in his official capacity as Acting

State Tax Commissioner of West Virginia, has no personal interest in the privilege tax of the State of West Virginia, which is complained about in plaintiff's bill of [fol. 32] complaint; but that it clearly appears from the allegations in said bill that the interest in said tax is in the public represented by the government of the State of West Virginia, who is the adverse claimant with respect to said tax, but who has not been made a party to this suit and who has not consented to be sued herein.

III

In the assessment and collection of West Virginia privilege tax referred to and complained of in plaintiff's bill of complaint, defendant, Ernest K. James, could not and cannot act in his individual capacity, and in the assessment and collection of said privilege tax defendant, Ernest K. James, Acting in his official capacity as Acting State Tax Commissioner of West Virginia, proceeds by virtue of statutory authority and as a public official of the State of West Virginia, and that he is an arm or instrumentality of the State government specifically constituted to carry on this phase of the State's business; that a suit against him as a public official of the State of West Virginia is in fact a suit against the State, and when brought by a resident or citizen of another State diversity of citizenship and Federal jurisdiction is not created

Wherefore, the said defendant, Ernest K. James, prays that said suit and bill of complaint be dismissed as to him individually and in his official capacity as Acting Tax Commissioner of West Virginia, and that he have and recover judgment for his reasonable costs expended herein.

Ernest K. James, Individually and in His Official Capacity as Acting Tax Commissioner of the State of West Virginia. Clarence W. Meadows, Attorney General of West Virginia. Forrest B. Poling, Assistant Attorney General.

[fol. 33] IN UNITED STATES DISTRICT COURT

[Title omitted]

DEFENDANT'S MOTION TO DISMISS BILL OF COMPLAINT—Filed February 15, 1937

Now comes Ernest K. James, individually and in his official capacity as Acting Tax Commissioner of West Virginia, and not waiving his motion to dismiss him in his individual and official capacity from the above styled action, but especially insisting thereon, and moves to dismiss the plaintiff's bill filed in this suit upon each and every one of the following grounds:

I

The said bill of complaint does not allege, state or make out a *cuase* such as to entitle the plaintiff to the relief prayed for or to any relief whatsoever.

II

The laws and statutes of the State of West Virginia give the plaintiff a full, adequate and complete remedy against the enforcement of the privilege tax complained of in the bill of complaint, if the said tax and statute imposing it be improper or unlawful in any respect.

III

The State privilege tax is laid upon the privilege of the plaintiff to transact business within the State of West Virginia, and there is no attempt to impose said tax on any of plaintiff's business transacted in other States or through West Virginia enroute or in course of transportation to other States, and the tax so imposed upon the transaction [fol. 34] of plaintiff's business within the State of West Virginia does not impose a burden upon the interstate business of the plaintiff transacted outside of, in and through the State of West Virginia.

IV

The laws and statutes of the State of West Virginia imposing the State privilege tax complained of, are lawful and constitutional enactments in all respects.

V

The allegations contained in plaintiff's bill of complaint clearly show a manner of transacting plaintiff's business within the State of West Virginia such as constitute said business intrastate rather than interstate.

Wherefore, defendant prays that said suit and said bill of complaint be dismissed, and that defendant may have and recover judgment for his reasonable costs in this behalf expended.

Ernest K. James, Individually and in His Official Capacity as Acting Tax Commissioner of the State of West Virginia. Clarence W. Meadows, Attorney General of West Virginia. Forrest B. Poling, Assistant Attorney General.

[fol. 35] In United States District Court

[Title omitted]

Answer of Defendant—Filed February 15, 1937

To the Honorable George W. McClintic, Judge of the District Court of the United States for the Southern District of West Virginia:

This defendant, not waiving his motions heretofore filed herein to dismiss the plaintiff's bill of complaint, and not waiving his motion heretofore filed herein to dismiss the bill of complaint upon its merits, but insisting thereon, and now at all times hereafter saving and reserving to himself any and all manner of benefits and advantages of exception that may be had or taken to the many errors, uncertainties, imperfections and insufficiencies in the plaintiff's said original bill of complaint contained, for answer thereunto, or to so much thereof as he is advised that it is material he should answer, answers and says:

I

The allegations of Paragraph I of the bill of complaint are admitted.

II

The allegations of Paragraph II of the bill of complaint are admitted.

III

This defendant admits that the amount in controversy in this suit, exclusive of interest and costs, exceeds the sum of three thousand dollars.

[fol. 36] This defendant denies that the controversy involved herein is wholly between citizens of different states, but to the contrary says that Ernest K. James, individually or in his official capacity, has no personal interest in the privilege tax of the State of West Virginia, which is complained about in plaintiff's bill of complaint, but, as clearly appears from the allegations in said bill, the interest in said tax is in the public represented by the government of the State of West Virginia, who is the adverse claimant with respect to said tax, but who has not been made a party to this suit and has not consented to be sued herein; and defendant further says with reference to Ernest K. James in his official capacity as Acting Tax Commissioner of the State of West Virginia, that he is a public official of the State of West Virginia and is sued as such, and that such diversity of citizenship does not exist when a suit is brought by a resident or a citizen of another state against a public official of the State of West Virginia acting in his official capacity; that the suit against Ernest K. James as Acting Tax Commissioner of the State of West Virginia, is a suit against a governmental instrumentality or arm of the State of West Virginia and is, in substance and fact, against the State of West Virginia with respect to which diversity of citizenship does not exist.

IV

This defendant admits that plaintiff is engaged in the business of distributing motion pictures from its place of business in the State of New York to exhibitors of motion pictures in practically every state of the United States, including the State of West Virginia, but defendant further says that, in addition to the distribution of said films as aforesaid, plaintiff is also engaged in the business of exhibiting same for profit in said states, and particularly in the State of West Virginia.

This defendant admits that plaintiff has no place of business or office in West Virginia and owns no property in [fol. 37] West Virginia, other than such of its films as are temporarily within West Virginia, except in the manner and form as hereinafter set forth, as to the distribution and exhibition of said films.

This defendant denies, upon information and belief, that plaintiff has no agents or employees in West Virginia, but to the contrary says that he is informed and believes and so states the fact to be, that plaintiff, in the transaction of its business of distributing and exhibiting films throughout the State of West Virginia, employs agents and representatives to personally contact the various exhibitors, and designates certain exhibitors as its agents for the purpose of shipping its films from one point of exhibition to another point of exhibition, all within the State of West Virginia, and more particularly in the manner hereinafter set forth, and has agents or employees operating within the State of West Virginia for the purpose of checking attendance at public exhibitions of such of its films as are leased to exhibitors on a percentage of the total receipts rather than a flat rental.

This defendant admits that plaintiff maintains branch offices in certain cities in the United States, including the city of Cincinnati, in the State of Ohio, Pittsburgh, in the State of Pennsylvania, and Washington, in the District of Columbia, and that no such branch office of like kind or character is maintained in the State of West Virginia.

This defendant admits the further allegations contained in Paragraph IV of said bill of complaint, except as stated further in this paragraph, and this defendant says further that he is informed and believes and so states the fact to be, that the exhibitors of said films, in addition to being authorized by contract to exhibit same for a number of days fixed by said contract, which period of time is usually for one day or for seven days or for some intermediate number of days, that said exhibitors are frequently permitted to modify said contract in such a manner as to permit the exhibitor to continue to exhibit said films for a longer period of time [fol. 38] than first specified in said contract, without shipping said film back to the plaintiff or any of its agents without the State of West Virginia, and without making or entering into any new contract or agreement with the plaintiff or any of its authorized agents without the State of

West Virginia, in the manner and form of the making of the original contract.

This defendant further says that although said contract provides that the exhibitor, at the end of the period of time specified in said contract to exhibit said film, will ship said film or films by a carrier designated or used by plaintiff to some other exhibitor, defendant is informed and believes and so states the fact to be, that said shipment is not usually outside of the State of West Virginia or to the said Cincinnati, Pittsburgh or Washington offices of the plaintiff, whichever shipped the film to the exhibitor, but at the express direction of said plaintiff or its authorized agents said films are shipped to other exhibitors within the State of West Virginia for exhibition thereof, and by that exhibitor in turn shipped to some other exhibitor within the State of West Virginia for exhibition, all pursuant to the direction of the plaintiff or its authorized agents, and that although the contracts are made in New York, and the films produced and owned outside the State of West Virginia and shipped from outside said state into said state to an exhibitor, said films are not immediately after the exhibition thereof by said exhibitor to whom they were first shipped, again shipped out of the State of West Virginia.

V

The allegations of Paragraph V of the bill of complaint are admitted, except in so far as therein stated that under each of such statutes or provisions of the Code an assessment of the tax by the Tax Commissioner was final as to any person who had failed or refused to make a return for the purposes of the tax. On the contrary, this defendant says that said assessment of tax by the Tax Commissioner [fol. 39] was final only in so far as the ruling or finding of said Tax Commissioner, as such, was concerned, in that, the power of said Tax Commissioner thereupon ceased in relation to the assessment of said tax. Defendant says, however, that said plaintiff was in no way thereby deprived of its substantive right to have said final order of the State Tax Commissioner reviewed by the proper state courts of West Virginia, in manner and form as hereinafter set forth.

VI

This defendant admits that the plaintiff may have been advised in the manner and to the effect as set forth in

Paragraph VI of the bill of complaint, but says that he is informed and believes and so states the fact to be, that under and by virtue of the statutes set forth in plaintiff's bill of Complaint, it became and was the duty of plaintiff to first file its return with the State Tax Commissioner of West Virginia, thereby placing said Tax Commissioner in a position to determine whether or not plaintiff came within a class subject to said privilege tax; that with the filing of said return, it also was the duty of the plaintiff, if the legality of said tax was to be questioned, to acquaint the Tax Commissioner with the nature and extent of and the manner in which its business was conducted, and that thereafter, if it was dissatisfied with the ruling of the Tax Commissioner in the premises, a petition for a hearing and correction of said tax should have been filed with the Board of Public Works; that in event of an adverse holding by the Board of Public Works, plaintiff then had the substantive right, under the laws of West Virginia, to have the decision of the Baord of Public Works reviewed by writ of certiorari, by the Circuit Court of Kanawha County, West Virginia, from which Circuit Court an appeal would lie to the Supreme Court of Appeals of West Virginia.

This defendant specifically denies that in the absence of the filing of the taxpayer's return, referred to herein, that the Tax Commissioner acted wrongly and unlawfully in estimating the tax to be imposed upon plaintiff or that any [fol. 40] wrong was perpetrated upon it by reason of the Tax Commissioner failing to serve notice upon it that he would proceed to investigate and estimate the amount of said tax in the absence of said return; and defendant further says that having failed to comply with the provisions of the statutes and having, in effect, acted as "judge of its own case," that plaintiff is not now in position to complain of the act of the Tax Commissioner of West Virginia in computing said tax, nor is plaintiff warranted in seeking the aid of a court of equity.

Defendant further denies that the assessment of said tax was unlawful, or that his actions tend to harrass and annoy the plaintiff in the manner set forth in Paragraph VI of said bill of complaint, and deny further that the pursuance on the part of said Tax Commissioner, of the provisions relating to the collection of said tax are such as would result in a multiplicity of suits, and say that the actions of said Acting Tax Commissioner looking forward to the col-

lection of said tax are lawful in all respects and such as have been given him expressly by virtue of such statutes and the laws of the State of West Virginia.

Defendant further denies that unless said Tax Commissioner is restrained and enjoined, as prayed for in said bill of complaint, that immediate and irreparable damage and injury will result to the plaintiff and its business.

VII

This defendant admits that under the provision of Section 7 of Article 13 of Chapter 11 of said Code, and under the statutes set forth in the bill of complaint, that the assessment made by the defendant against the plaintiff is final, but say that it is final in this respect only; that in so far as said Tax Commissioner is concerned, he has no further powers or duties to perform with reference to the assessment of said tax in the manner of hearings, adjustments or revisions, but that his duties, after said assessment, relate only to the collection of said tax, and that both [fol. 41] his method and the amount of the assessment of the tax as fixed by him in said "final" order are subject to review by writ of certiorari by the Circuit Court of Kanawha County, West Virginia, and by the Supreme Court of Appeals of West Virginia, which said remedies have not been sought by plaintiff before appealing to this court for injunctive relief, although the same are an integral part of the substantive law of the State of West Virginia, and providing a just, speedy and adequate remedy at law for the plaintiff in the matter of having said assessment corrected or annulled in any respect whatsoever.

Defendant further says that had plaintiff filed its return as provided by this statute, that plaintiff would have had an adequate opportunity to have been heard in the matter by the State Tax Commissioner in his administrative capacity; and the defendant further denies that plaintiff has no adequate remedy at law for the reasons heretofore enumerated.

VIII

This defendant denies that plaintiff has never been and is not now engaged in the State of West Virginia in the business of collecting incomes from the use of real or personal property or any interest therein, whether by lease, conveyance or otherwise, and has never been and is not now

engaged in any business in the State of West Virginia and that all of its business has been conducted wholly without said state, but says that the business conducted by the plaintiff in and about the collection of rents, royalties and incomes from the use of its films for exhibition purposes in the State of West Virginia is clearly such a business as comes within the clear purview of the statutes of this state in relation thereto, and which are set forth fully in plaintiff's bill of complaint.

This defendant denies that the business and activities of the plaintiff upon which defendant has levied said tax [fol. 42] are conducted solely in interstate commerce, and that the imposition of said tax will constitute or is an undue burden or hindrance upon interstate commerce and in violation of the Constitution of the United States, or that in so far as said statutes mentioned in said bill of complaint undertake to impose a tax computed upon the income of the plaintiff that they constitute or that any of them constitutes and causes an unlawful exaction on income derived from interstate commerce, and imposes an undue burden and hindrance upon interstate commerce in violation of the Constitution of the United States or that they are particularly contrary and repugnant to Section 8 of Article 1 thereof, and that any of said statutes are thereby void, but to the contrary, says that said tax is a valid privilege tax imposed upon plaintiff by virtue of the fact that said plaintiff is most certainly collecting and deriving an income from the use of its personal property within the State of West Virginia, and any claims, demands or acts of the defendant in relation thereto is not a burden on interstate commerce.

Defendant denies that the provisions of Article 13 of Chapter 11 of said Code of West Virginia and of the statutes set forth in the plaintiff's bill of complaint deny to plaintiff any adequate remedy at law for redress against any tax assessment, for the reason that an adequate and speedy remedy is provided in the manner hereinbefore set forth and available to plaintiff in the state courts of West Virginia, and does not deprive the plaintiff of its property without due process of law or deny to it the equal protection of the laws in contravention to the fifth and fourteenth amendments to the Constitution of the United States.

And now, having fully answered the plaintiff's bill of complaint, this defendant prays that the injunctive and any and all other relief prayed for in said bill of complaint be de-

nied the plaintiff; that the plaintiff's bill of complaint be [fol. 43] dismissed as to this defendant, and that this defendant may be hence dismissed with his reasonable costs in this behalf expended, and as in duty bound, he will ever pray, etc.

Ernest K. James, Individually and in His Official Capacity as Acting Tax Commissioner of the State of West Virginia. Clarence W. Meadows, Attorney General for the State of West Virginia. Forrest B. Poling, Assistant Attorney General.

Duly sworn to by Ernest K. James. Jurat omitted in printing.

[fol. 44] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FILING STIPULATION—March 8, 1937

This day came the parties by their attorneys, and tendered and asked leave to file a stipulation in writing herein, and the same is ordered to be and is hereby filed.

[fol. 45] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO FACTS—Filed March 8, 1937

It is agreed between counsel for the plaintiff and the defendant herein that the following are the facts in this case:

1. The facts alleged in the bill of complaint are true, excepting any statement therein that may be changed or modified by this stipulation.

2. Nothing in this stipulation shall be taken as stating any fact or inference of fact as to such matters as are contained in the Bill of Complaint or other pleadings which are purely conclusions of the pleader as to the rights, duties, acts and omissions to act of either party to this cause in relation to the statutes involved herein.

3. The plaintiff employs a representative who comes into the State of West Virginia regularly and spends approximately one-half of his employed time in said State encouraging and soliciting various theatre managers or owners therein to exhibit the plaintiff's films, and in doing so, it is the custom and practice of said representative to exhibit to said theatre managers or owners the public announcements of the motion pictures the plaintiff has or will have for release and distribution, and to procure the signature of said theatre managers or owners to written applications in the form of offers to the plaintiff at its place of business in New York.

[fol. 46] 4. The plaintiff does not designate and has never designated exhibitors in West Virginia to act as its agents for the purpose of shipping films to other exhibitors in West Virginia, unless agency is established by the fact that on two occasions during the year 1936 it requested an exhibitor to forward a film to another exhibitor within the State, which other exhibitor then returned the film in each instance to the plaintiff without the State. On all other occasions in 1936 films were returned by exhibitors directly to the plaintiff without the State. During the year 1936 the plaintiff made a total of 1,546 shipments of films into West Virginia, to 144 theatres, all of which shipments were returned to the plaintiff without the State.

5. The plaintiff did not in 1936 or any other year permit any exhibitor to exhibit a picture for a longer time then the period specified in a contract, unless such exhibitor made a formal request for such privilege and unless such request was officially approved in New York and unless the exhibitor paid additional compensation for such additional time.

6. During the year 1936 the plaintiff caused the admissions to theatres in the State of West Virginia to be checked on eight separate occasions, which checks were made for the purpose of ascertaining the receipts from theatre admissions during the day or days when the pictures of the plaintiff were being exhibited therein, in order to arrive at the correct amount due to the plaintiff from the exhibitor on a percentage basis for the privilege of exhibiting plaintiff's picture by said exhibitor. Said checks were all made by

an independent contractor under an arrangement between the plaintiff and the exhibitor.

R. G. Kelly, Counsel for United Artists Corporation.
Clarence W. Meadows, Attorney General and Counsel for Ernest K. James, Acting Tax Commissioner.

[fol. 47] In United States District Court

[Title omitted]

Order Calling Additional Judges, etc.—March 19, 1937

For the reasons set out in an order heretofore entered herein, the Honorable George W. McClintic, Judge of this Court, hereby calls to his assistance to hear and determine the application herein for an interlocutory injunction in this cause the Honorable Elliott Northcott, Judge of the United States Circuit Court of Appeals for the Fourth Circuit, and the Honorable Harry E. Watkins, Judge of the United States District Court for the Southern and Northern Districts of West Virginia.

And it is further ordered that said application be and the same is set for hearing at ten o'clock A. M. on the 30th day of March, 1937, at which time the defendant is ordered to appear and show cause, if any he has, why an interlocutory injunction should not issue as prayed for in said bill of complaint.

[fol. 48] In United States District Court

In Equity. No. 3624

United Artists Corporation, a Corporation,

v.

Ernest K. James, Individually and in His Official Capacity as Acting Tax Commissioner for the State of West Virginia (Successor to Fred L. Fox, the Original Defendant)

Final Decree—May 20, 1938

This cause came on to be heard by the Honorable George W. McClintic, Judge of the United States District Court

for the Southern District of West Virginia, the Honorable Elliott Northcott, Judge of the United States Circuit Court of Appeals for the Fourth Circuit, and the Honorable Harry E. Watkins, Judge of the District Court of the United States for the Southern and Northern Districts of West Virginia, pursuant to Section 266 of the Judicial Code, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz:

1. That the allegations of the bill are fully sustained and that the plaintiff is not doing business in the State of West Virginia as described in the taxing statute set out in the pleadings herein, and that the transactions of the plaintiff as described in the bill and in the stipulation herein constitute interstate commerce, and that the attempted taxing thereof by the defendant would violate the Constitution of the United States, and that the plaintiff is entitled to have the temporary restraining order heretofore granted in this cause made perpetual, all of which more fully appears from the findings of fact and conclusions of law and the opinion of said three-Judge Court herein which are filed herein and are hereby made a part of the record in this cause.

2. That the said defendant, Ernest K. James, individually and as Tax Commissioner of the State of West Vir-
[fol. 49] ginia, his agents, servants, and employees, be, and they are, and each of them is, hereby forever and perpetually restrained and enjoined from collecting and from attempting to collect from the plaintiff the tax assessed against the plaintiff as set out in the bill of complaint herein, or from imposing, levying, or assessing against the plaintiff any tax measured by the income received, or to be received, by the plaintiff for the use of or for the right to exhibit motion picture films owned by it and distributed to exhibitors in West Virginia, as described in said bill of complaint, and from imposing or attempting to impose upon the plaintiff any interest or penalty on account of the failure of the plaintiff to pay any such tax, and from enforcing or attempting to enforce any penalty against the plaintiff for the non-payment of, or failure to make a return for the purpose of, any such tax.

3. That service of a certified copy of this order upon the defendant shall be sufficient notice thereof.

Elliott Northcott, Judge of the United States Circuit Court of Appeals, Fourth Circuit. Geo. W. McClintic, Judge of the United States District Court for the Southern District of West Virginia. Harry E. Watkins, Judge of the United States District Court for the Southern and Northern Districts of West Virginia.

[fol. 50] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, AT CHARLESTON

No. 3624

UNITED ARTISTS CORPORATION, a Corporation,

versus

ERNEST K. JAMES, Individually and in His Official Capacity as Acting Tax Commissioner for the State of West Virginia (Successor to Fred L. Fox, the Original Defendant)

Suit by the United Artists Corporation against Ernest K. James, Acting Tax Commissioner of West Virginia, for an Injunction

Injunction Awarded

Before Northcott, Circuit Judge, and McClintic and Harry E. Watkins, District Judges

E. W. Knight and R. G. Kelly for plaintiff, Clarence W. Meadows, Attorney General of West Virginia, and Forrest B. Poling, Assistant Attorney General for defendant.

Findings of Fact, Conclusions of Law and Opinion

McCLINTIC, District Judge:

The Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

There is no dispute as to the facts as they were stipulated. The stipulation shows the following material facts.

The plaintiff, United Artists Corporation, a corporation, is one created under the laws of the State of Delaware, with its principal office and chief place of business located [fol. 51] in the City of New York in the State of New York.

The defendant, Ernest K. James, at the time of the submission of this suit, was the Acting Tax Commissioner of the State of West Virginia (successor to Fred L. Fox; set out in the bill herein as Tax Commissioner). He is now the duly appointed and qualified Tax Commissioner. He is a citizen and resident of the City of Charleston, Kanawha County, West Virginia, and of the Southern Judicial District of West Virginia, and as such Tax Commissioner is charged with the duty of collecting taxes for the State of West Virginia and administering and enforcing the tax laws of the State of West Virginia.

This is a suit of a civil nature in equity. The controversy involved therein is wholly between citizens of different states, and the amount in controversy therein exceeds three thousand dollars, exclusive of interest and costs.

The plaintiff is engaged in the business of distributing motion pictures from its place of business in the State of New York to exhibitors of motion pictures in practically every state of the United States, including the State of West Virginia.

The plaintiff has no place of business, office, agents or employees in West Virginia, and owns no property in West Virginia other than such of its films as are temporarily within West Virginia for exhibition purposes.

The plaintiff maintains branch offices in certain cities of the United States, including the Cities of Cincinnati in the State of Ohio, Pittsburgh in the State of Pennsylvania and Washington in the District of Columbia, but no office of any kind is maintained in the State of West Virginia.

The method of doing business between the plaintiff and West Virginia exhibitors is as follows: The plaintiff makes public announcement from time to time of motion pictures that it has or will have for release. Theatre owners or managers who desire to exhibit motion pictures that the plaintiff has or expects to have for distribution make [fol. 52] written application in the form of an offer to the plaintiff at its place of business in New York, usually through the representatives of one of the three branches

above named, for a certain picture or for a number of certain pictures or for a number of pictures to be selected by the exhibitor.

The plaintiff, through its proper officers or representatives at its main office in the City of New York, rejects or accepts such application and offer. When such application and offer is accepted a contract is made by executing upon such application and offer an acceptance thereof in the State of New York, and returning such contract, composed of the application and offer and such acceptance, to the said exhibitor.

Such contract provides that the motion picture films therein specified or to be selected as therein provided for will at the time or times specified or provided for be sent by the plaintiff to the exhibitor, who is by the contract authorized to exhibit such films for a number of days fixed by the contract, which period of time is usually for one day or for seven days or for some intermediate number of days. The contract provides that the exhibitor will pay the plaintiff for the right to exhibit such films, which payment is sometimes fixed by the contract as a specified sum of money and sometimes as a specified percentage of the receipts from theatre admissions during the day or days when said picture is exhibited. The contract further provides that the exhibitor at the end of such period will ship said film or films by a carrier designated or used by plaintiff, to some other exhibitor, who is usually outside of the State of West Virginia, or to the Cincinnati office of the plaintiff, or to the Pittsburgh or Washington office of the plaintiff, whichever shipped the film to the exhibitor, such shipment in any event to be at the direction of the plaintiff, and such films are always finally returned to the plaintiff [fol. 53] in New York or at some point without the State of West Virginia.

Pursuant to said contract the plaintiff sends the films from one of said branch offices without the State of West Virginia by express or parcel post or other carrier to the exhibitor in West Virginia. Such exhibitor then exhibits such films in ordinary motion picture theatres, and charges an admission fee to such of the public as desire to see such exhibition. When the use of the pictures is completed according to the contract they are re-shipped on advices given by the plaintiff. Usually said contracts are sent by

the New York office of the plaintiff to its said Cincinnati or Washington, D. C., or Pittsburgh office, and by said office to West Virginia exhibitors. There are a large number of exhibitors of plaintiff's films in the cities and towns of West Virginia, such films being exhibited in nearly all the counties in said State. All prints and films of the motion pictures licensed for exhibition by exhibitors in West Virginia are manufactured and made in laboratories in the State of California, and all of such prints and films are sent from California to Cincinnati, Pittsburgh, and Washington and thence to exhibitors in West Virginia. Always the contracts are made in New York, the films are produced and owned outside the State of West Virginia, and the films are shipped from without the State of West Virginia into the State of West Virginia to the exhibitor and are afterwards again shipped out of the State of West Virginia, and payments by the exhibitor are sent to and received by plaintiff without the State.

The plaintiff employs a representative who comes into the State of West Virginia regularly and spends approximately one-half of his employed time in said State encouraging and soliciting various theatre managers or owners therein to exhibit the plaintiff's films, and in doing so, it is the custom and practice of said representative to exhibit to said theatre managers or owners the public announcements of the motion pictures the plaintiff has or will have [fol. 54] for release and distribution, and to procure the signatures of said theatre managers or owners to written applications in the form of offers to the plaintiff at its place of business in New York.

The plaintiff does not designate and has never designated exhibitors in West Virginia to act as its agents for the purpose of shipping films to other exhibitors in West Virginia. On two occasions in the year 1936 it requested an exhibitor to forward a film to another exhibitor within the state, which other exhibitor then returned the film in each instance to the plaintiff without the state.

On all other occasions in 1936 films were returned by exhibitors directly to the plaintiff without the state. During the year 1936 the plaintiff made a total of fifteen hundred and forty-six shipments of films into West Virginia, to one hundred and forty-four theatres, all of which shipments were returned to the plaintiff without the state.

The plaintiff did not, in 1936 or any other year, permit any exhibitor to exhibit a picture for a longer time than the period specified in a contract, unless such exhibitor made a formal request for such privilege and unless such request was officially approved in New York and unless the exhibitor paid additional compensation for such additional time.

During the year 1936 the plaintiff caused the admissions to theatres in the State of West Virginia to be checked on eight separate occasions, which checks were made for the purpose of ascertaining the receipts from theatre admissions during the day or days when the pictures of the plaintiff were being exhibited therein, in order to arrive at the correct amount due to the plaintiff from the exhibitor on a percentage basis for the privilege of exhibiting plaintiff's pictures by said exhibitor. These checks were all made by an independent contractor under an arrangement between the plaintiff and the exhibitor.

[fol. 55] By Article 13 of Chapter 11 of the West Virginia Code of 1932, as amended and in effect from March 9, 1935, such Article dealing with the Business and Occupation Tax of West Virginia, it is provided that (Section 2-(h)) a tax equal to one per cent of gross income is levied upon and shall be collected from every person engaging or continuing within the State in any service business or calling not otherwise specifically taxed under said law; that (Section 2-(i)) upon every person engaging or continuing within the State of West Virginia in the business of collecting incomes from the use of real or personal property or of any interest therein, whether by lease, conveyance, or otherwise, and whether the return be in the form of rentals, royalties, fees, interest, or otherwise, the tax shall be one per cent of the gross income of any such activity; that (Section 4) taxes levied under said Article 13 shall be payable in quarterly installments on or before the expiration of thirty days from the end of the quarter in which they accrue, and the taxpayer shall within thirty days from the expiration of each quarter make out an estimate of the tax for which he is liable for such quarter, verify the same by oath and mail the same, together with a remittance in the form required, to the office of the defendant; that (Section 5) on or before thirty days after the end of the tax year each person liable for the payment of any such tax shall make a return showing the

gross proceeds of sales or gross income of business, compute the amount of tax chargeable against him in accordance with the provisions of said Article, deduct the amount of quarterly payments, if any, and transmit with his report a remittance in the required form covering the residue of the tax chargeable against him to the defendant.

Such article further provides that (Section 7) if any person fail or refuse to make return, or if the Tax Commissioner has reasonable ground to believe that any return [fol. 56] made is so deficient as not to form the basis of a satisfactory assessment of tax, the Tax Commissioner may proceed as he deems best to obtain information on which to base the assessment of the tax, shall assess the tax and notify the person assessed of the amount of the tax; and the assessment of the tax by the Tax Commissioner shall be final as to any person who refused to make a return.

Such Article further provides that (Section 8) any person, having made the return and paid the tax as provided therein, who feels aggrieved by the assessment made upon him, may apply to the Board of Public Works within thirty days after notice is mailed to him by the Tax Commissioner for a hearing and correction of the amount of the tax so assessed against him, said Board may grant or deny such hearing, and upon a hearing, if granted, may make such order as shall appear to it just and lawful; any person improperly charged with any tax and required to pay the same may recover the amount paid, together with interest, in any proper action or suit against the Tax Commissioner, and the Circuit Court of the County in which the taxpayer resides or is located shall have original jurisdiction of any such action and shall adjudge costs to such extent and in such manner as may be deemed equitable, and upon presentation of a certified copy of a judgment in any such action the Auditor of the State of West Virginia shall issue his warrant upon any funds in the State Treasury available for the payment thereof; no injunction shall be awarded to restrain the collection of taxes imposed thereby except upon the ground that the assessment thereof was in violation of the Constitution of the United States or the Constitution of the State of West Virginia, or that the same were fraudulently assessed, or that there was a mistake made in the amount of taxes assessed upon such person, and in the latter case the bill must show an application to the Board

[fol. 57] of Public Works for the correction of the assessment and the payment into the treasury of all taxes appearing by the bill of complaint to be owing.

Such Article further provides that (Section 9) the assessment of taxes and the returns required shall be for the year ending on the 31st day of December; that (Section 11) all remittances of taxes imposed thereby shall be made to the Tax Commissioner and he shall pay the moneys into the State treasury to be kept and accounted for as provided by law; that (Section 12) a tax due and unpaid thereunder shall be a debt due the State and a lien upon the property used in the business or occupation upon which it is imposed, such lien shall have the same priority as the lien of the general property tax, a penalty of five per cent shall be added for any default for thirty days or less, and for each succeeding thirty days of such default there shall be added an additional penalty of one per cent; that (Section 13) the Tax Commissioner may collect taxes due and unpaid thereunder, together with all accrued penalties, by an action in assumpsit, motion for judgment, or other appropriate proceedings in the Circuit Court of the County in which the privilege taxed has been exercised; and in the event of default in payment of the tax for sixty days after the same shall be due the Tax Commissioner may proceed in the Circuit Court of the County in which the privilege taxed has been exercised to obtain an injunction restraining the further exercise of the privilege until full payment of all taxes and penalties due under said Article; that (Section 20) the Tax Commissioner may distrain upon any goods, chattels, or intangibles of any taxpayer delinquent under said Article for the amount of all taxes and penalties accrued and unpaid thereunder, and he is authorized to require the assistance of the sheriff of any county of the state in levying such distress in the county of which such sheriff is an officer.

[fol. 58] Such Article further provides that (Section 21) it shall be unlawful, under penalty of a fine not exceeding one-thousand dollars and imprisonment not exceeding one year, for any person to refuse to make the return provided for therein, or make any false or fraudulent return or false statement in any return with intent to defraud the state or to evade the payment of the tax or any part thereof imposed thereby, or for any person to aid or abet another in any at-

tempt to evade the payment of such tax, or for an officer of any corporation to make or permit to be made for any corporation any false return or false statement in any return required thereby, with intent to evade the payment of any tax thereunder.

Chapter 1 of the Acts of the Extraordinary Session of the Legislature of West Virginia, effective July 1st, 1925, imposed (Section 2-(g)) a tax of three-tenths of one per cent of the gross income of any business not included in businesses enumerated in the statute, and this provision became Section 2-(g) of said Article 13 of Chapter 11 of the West Virginia Code of 1932, and pursuant to amendment made by Chapter 33 of the Acts of the Legislature of 1933, effective May 26, 1933, the substance of said provision became Section 2-(h) of said Article 13 as now in effect, with an increase of the tax imposed to one per cent of the gross income of any such business. And under each such statute or provisions of the Code an assessment of tax by the Tax Commissioner was final as to any person who had failed or refused to make a return for the purposes of the tax.

The plaintiff, under its view of the case, has never made any of the estimates, reports or returns required by the Code of West Virginia, as amended and now in effect, or by any previous statute to be made by persons engaged in business in West Virginia.

The defendant, under its view of the case, made an assessment of the tax against the plaintiff, as of October [fol. 59] 1st, 1936, of the sum of four-thousand and two dollars and nineteen cents, and demanded the payment of such sum as a tax under the statute, and claims that the plaintiff should pay such tax upon all such sums as it may receive in West Virginia from exhibitors of its films after October 1st, 1936.

The defendant has threatened and now threatens to undertake to enforce the collection of the amount of the tax assessed by him, with all accrued penalties and those to accrue, and for the purpose to bring against the plaintiff actions at law in the counties, or some of them, in which plaintiff's films have been and from time to time are being shown, and in such actions to sue out attachments and to make the exhibitors of plaintiff's films garnishees thereunder, and to distrain plaintiff's films in the possession from time to time of exhibitors in the State of West Virginia,

and further threatened that if plaintiff shall refuse for sixty days to pay the amount of the tax assessed, to institute suits in chancery in the courts of the counties of West Virginia in which the plaintiff's films have been and from time to time are being shown, for an injunction to restrain the further showing of such films until full payment shall be made of all the taxes and penalties claimed by the defendant to be due.

The defendant also threatens to repeat and continue such suits and attachments until he has collected all such taxes and penalties, and also threatens to harass and annoy the exhibitors by the service of notices of garnishment upon them, by seizing under distraint films in their hands from time to time, and by enjoining the showing of plaintiff's films by such exhibitors until the plaintiff has paid the taxes so assessed.

Conclusions of Law

The Court concludes that there is involved in this suit [fol. 60] the necessary amount to give the District Court of the United States for the Southern District of West Virginia jurisdiction of the cause; that the plaintiff has no adequate remedy at law, and that a court of equity has jurisdiction of the issue; that the plaintiff never has been and is not now engaged within the State of West Virginia in the business of collecting incomes from the use of real or personal property or interest therein, whether by lease, conveyance or otherwise, and whether the return be in the form of rents, royalties, fees, interest or otherwise; and that the acts of the plaintiff hereinbefore set out constitute "interstate commerce".

Opinion

This is a suit in equity brought by the plaintiff seeking to restrain the collection of certain taxes sought to be imposed by the State of West Virginia. A District Court of three Judges, organized in accordance with Section 266 of the Judicial Code, as amended (28 U. S. C. A., Sec. 380) heard the case on plaintiff's application for interlocutory and permanent relief.

At the hearing no evidence was taken, the cause being submitted on the stipulation of facts. It was agreed that the hearing should be final.

The tax sought to be imposed upon the plaintiff is a tax of one per cent of the gross income received by the plaintiff from the exhibitors of its films in the State of West Virginia.

In the case of Paramount Pictures Distributing Company, et al. v. Henneford, et al., 184 Wash. 376, 51 Pac. (2) 385, (writ of certiorari denied by Supreme Court, 298 U. S. 665) the court, in reference to the exact same sort of tax, under a similar statute and between a film company and a Tax Commissioner, said:

"* * * The tax provided for in the statute is an excise tax, and not a property tax. It is based upon a percentage [fol. 61] of the gross income of a particular business. State ex rel. Stiner v. Yelle, 174 Wash. 402, 25 P. (2d) 91; Supply Laundry Co. v. Jenner, 178 Wash. 72, 34 P. (2d) 353. It being an excise tax for the purpose of raising revenue, the act of the legislature imposing it was not passed in the exercise of the police power. Whether a law is enacted in the exercise of that power depends upon whether the primary purpose is to raise revenue or to regulate industry. If the primary purpose is regulation, it is enacted under the police power, even though it may be called a license or tax. Fox Film Corporation v. Trumbull, 7 Fed. (2d) 715; Cooley on Taxation (3d ed.) vol. 2, p. 1127. As already indicated, chapter 191 of the laws of 1933 and the amendatory acts thereto were plainly enacted for the primary purpose of collecting revenue, and not for the purpose of regulating industry. Cases cited, which hold that the state legislature, in the exercise of the police power, may regulate to some extent a business which is interstate in character, have no application to this case.

Inquiry will now be directed as to whether the business done by the local exchange, in the manner above indicated, is a part of interstate commerce. This presents a federal question, and is controlled by the case of Binderup v. Pathe Exchange, 263 U. S. 291. In that case New York manufacturers and distributors of motion picture films, in the regular course of their business, shipped the films from the state of New York to the state of Nebraska, and delivered them to a Nebraska resident, through a local agent of the manufacturers in that state, and it was there held that the business of the manufacturers and producers of the films and their transactions with the exhibitors were interstate commerce, notwithstanding that in accordance with the contracts the films were delivered through a local exchange

in Nebraska through which they were first consigned and transported."

The opinion in this case then quotes at length from the Binderup Case, which was held as binding upon it so far as the doctrine of interstate commerce is concerned.

We agree with this holding.

The defendant attempts to draw a distinction between anti-trust cases and tax cases, claiming that while the former may be interstate commerce, the latter is not necessarily so. No real authority is cited for this claim, and under all the authorities to the contrary and the facts here, we are unable to agree with this alleged distinction.

The contention of the defendant that the plaintiff had [fol. 62] an adequate administrative remedy is, in our opinion, not tenable. The law quoted heretofore gives the right to pay the tax and sue the Tax Commissioner for its recovery. This remedy, if it can be called such, would be judicial and a Federal Court would have jurisdiction when the other essentials thereof are present.

The defendant further contends that the plaintiff lost any right, when it did not make a return and pay the assessed tax.

If the tax was unlawful, then the plaintiff was not required to pay it and go into a State Court for its recovery (when it has a right to resort to a Federal Court) and if judgment for the recovery of the tax is obtained, to then wait until a legislature, of its own free will, sees fit to appropriate money for the refund.

The Tax Commissioner was required to pay any money collected into the State Treasury immediately upon its receipt, and only the act of an independent legislature, which meets every two years for a constitutional period of sixty days, can take it out.

Since writing the foregoing Opinion the Supreme Court of West Virginia, in the case of the Charleston National Bank, et al. v. Fred L. Fox, has had before it for consideration whether Chapter 87 of the Acts of the Legislature; Regular Session, 1935, providing for the refund of taxes collected and improperly required to be paid by the State Tax Commissioner, had been validly passed by the Legislature.

The Court decided in an opinion filed Nov. 23rd 1937, that it had not been validly enacted and was of no effect. As we see it, this only strengthens our conclusion above.

[fol. 63] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—May 21, 1938

This cause coming on further to be heard upon the petition of Ernest K. James, individually and in his official capacity as Acting Tax Commissioner for the State of West Virginia (successor to Fred L. Fox, the original defendant), for the allowance of an appeal to the Supreme Court of the United States, in which petition said defendant prays that the amount of security for cost bond to be executed by him be fixed.

It is Ordered that the appeal prayed for is granted; that the permanent injunction is suspended during the pendency of this appeal, upon the condition that the said defendant, Ernest K. James, make and file a cost bond with good and sufficient surety in the sum of Two Thousand Dollars ($2,000.00), conditioned as required by law.

That the Clerk of this Court transmit to the Supreme Court of the United States in the manner provided by law a transcript of such parts of the record and proceedings [fol. 64] herein, duly authenticated, as the parties, defendant and plaintiff, may by praecipe duly designate.

That a citation be issued admonishing the plaintiff to be and appear in the Supreme Court of the United States on or before the 1st day of July, 1938.

Whereupon came the said Ernest K. James, defendant as aforesaid, and tendered a cost bond executed by him as principal, and by Standard Accident Insurance Company, as surety, in the amount of Two Thousand Dollars ($2,000.00), and conditioned according to law and in accordance with the provisions of this order, which bond, having been inspected by the Court, is approved and ordered filed.

Elliott Northcott, Judge of the United States Circuit Court of Appeals for the Fourth Circuit. Geo. W. McClintic, Judge of the District Court of the United States for the Southern District of West Virginia. Harry E. Watkins, Judge of the District Court of the United States for the Northern and Southern Districts of West Virginia.

The undersigned counsel of record for the Appellee hereby acknowledge service of a copy of the above order allowing appeal, this 21st day of May, 1938.

E. W. Knight, R. G. Kelly, Counsel for Appellee.

[fol. 65] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR ALLOWANCE OF APPEAL—Filed May 21, 1938

To the Honorable Elliott Northcott, Judge of the United States Circuit Court for the Fourth Circuit; the Honorable George W. McClintic, Judge of the District Court of the United States for the Southern District of West Virginia; and the Honorable Harry E. Watkins, Judge of the District Court of the United States for the Northern and Southern Districts of West Virginia, composing the statutory court under the provisions of Section 266, amended, of the Judicial Code:

Now comes the defendant, Ernest K. James, individually, and in his official capacity as Acting Tax Commissioner for the State of West Virginia (successor to Fred L. Fox, the original defendant), and considering himself aggrieved by the decree entered on the 21st day of May, 1938, in the above-entitled cause, awarding a permanent injunction as prayed for in the complainant's bill of complaint, does hereby appeal therefrom to the Supreme Court of the United States, for the reasons specified in the assignment of errors, which is herewith filed, and prays:

1. That this appeal be allowed;

[fol. 66] 2. That a citation be issued to the above-named plaintiff, United Artists Corporation, a corporation organized and existing under the laws of the State of Delaware, as provided by law;

3. That an order be entered herein pending the final disposition of the cause, and that the amount of surety for cost bond be fixed by order allowing the appeal;

4. That a transcript of the record, proceedings and papers upon which said decree was predicated, duly authenticated, be sent to the Supreme Court of the United States, together with the typewritten statement of the defendant disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the decree, and his praecipe indicating the portions

of the record to be incorporated in the transcript, which praecipe and statement are filed herewith.

Ernest K. James, Individually and in His Official Capacity as Acting State Tax Commissioner of the State of West Virginia (Successor to Fred L. Fox, the Original Defendant), by Clarence W. Meadows, Attorney General of West Virginia; W. Holt Woodell, Assistant Attorney General; Forest B. Poling, Assistant Attorney General, His Counsel.

The undersigned counsel of record for the plaintiff hereby acknowledge service of a copy of the foregoing petition for appeal, this the 21st day of May, 1938.

E. W. Knight, R. G. Kelly, Counsel for Plaintiff.

[fol. 67] ORDER ALLOWING APPEAL

Appeal allowed upon defendant's giving bond conditioned as required by law in the sum of Two Thousand Dollars ($2000.00), the same to act as a Supersedeas Bond and also a bond for costs.

Elliott Northcott, Judge of the United States Circuit Court of Appeals for the Fourth Circuit. Geo. W. McClintic, Judge of the District Court of the United States for the Southern District of West Virginia. —— ——, Judge of the District Court of the United States for the Northern and Southern Districts of West Virginia.

[fol. 68] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL—Filed May 21, 1938

To Messrs. E. W. Knight and R. G. Kelly, Attorneys of Record for the Plaintiff in the Above Styled Cause:

Please take notice that the defendant in the above styled cause, feeling aggrieved by the decree entered therein, on the 21st day of May, 1938, will, on the 21st day of May, 1938, or as soon thereafter as his counsel may be heard,

present to this Court his petition praying for the allowance of an appeal to the Supreme Court of the United States, and for the entry of an order fixing the amount of security to be given, accompanied with his "Assignment of Errors" and his "Statement on Behalf of Defendant as to Jurisdiction of the Supreme Court of the United States to review Decree upon Appeal," a copy of each of which said papers is hereto attached.

Clarence W. Meadows, Attorney General of West Virginia; W. Holt Wooddell, Assistant Attorney General; Forest B. Poling, Assistant Attorney General, Counsel for Defendant.

[fol. 69] Service of a copy of the above and foregoing notice acknowledged this 18th day of May, 1938.

E. W. Knight, R. G. Kelly, Attorneys for Plaintiff.

[fol. 70] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed May 21, 1938

Now comes Ernest K. James, individually and in his official capacity as Acting Tax Commissioner for the State of West Virginia (successor to Fred L. Fox, the original defendant), the defendant in the above-styled cause, by his counsel, and says that there are manifest errors in the record, proceedings and final decree in said cause, upon which he will rely upon his appeal from the decree entered on the 21st day of May, 1938, and, for the purpose of having the cause reviewed in the Supreme Court of the United States, makes the following assignment of errors, to-wit:

1. The court erred in holding, as a conclusion of law, that the State of West Virginia has no power to impose upon and collect from the plaintiff the West Virginia Business and Occupation Tax (Sections 2 (h) and 2 (i), Article 13, Chapter 11, Code of West Virginia, as amended by Chapter 33, Acts of the Legislature of West Virginia, First Extraordinary Session 1933, and Chapter 86, Acts of the Legislature of West Virginia, Regular Session, 1935), against the plaintiff, with respect to gross income received

by it from exhibitors of its films in West Virginia, on account of the exhibition thereof in said State, for the reason [fol. 71] that the plaintiff never has been and is not now engaged within the State of West Virginia in the business of collecting incomes from the use or real or personal property, or interest therein, whether by lease, conveyance or otherwise, and whether the return be from all rents, royalties, fees, interests or otherwise.

2. The court erred in holding, as a conclusion of law, that the State of West Virginia has no power to impose upon and collect from the plaintiff the West Virginia Business and Occupation Tax (Sections 2 (h) and 2 (i), Article 13, Chapter 11, Code of West Virginia, as amended by Chapter 33, Acts of the Legislature of West Virginia, First Extraordinary Session 1933, and Chapter 86, Acts of the Legislature of West Virginia, Regular Session, 1935), against the plaintiff, with respect to gross income received by it from exhibitors of its films in West Virginia, on account of the exhibition thereof in said State, for the reason that the acts of the plaintiff, in and about the exhibition of its films in West Virginia, and the receiving of moneys therefor, constitute "Interstate Commerce."

3. The court erred in awarding the permanent injunction prayed for in the bill of complaint.

Wherefore, the defendant, Ernest K. James, individually and in his official capacity as Acting Tax Commissioner for the State of West Virginia (successor to Fred L. Fox, the original defendant), prays that the decree of the District Court of the United States for the Southern District of West Virginia be reversed, and that the injunction granted by said court be dissolved, and a judgment entered in accordance with the rights of the defendant.

Clarence W. Meadows, Attorney General of West Virginia; W. Holt Wooddell, Assistant Attorney General; Forest B. Poling, Assistant Attorney General, Counsel for Defendant.

[fols. 72-102] The undersigned, counsel of record for the plaintiff, hereby acknoweldge service of a copy of the foregoing assignment of errors, this the 21st day of May, 1938.

E. W. Knight, R. G. Kelly, Counsel for Plaintiff.

[fols. 103-104] Bond on appeal for $2,000.00, approved and filed May 21, 1938, omitted in printing.

[fols. 105-107] Citation, in usual form, showing service on E. W. Knight et al., omitted in printing.

[fol. 108] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed May 21, 1938

To the Clerk of the District Court of the United States for the Southern District of West Virginia:

You will please prepare a transcript of the record to be transmitted to the Supreme Court of the United States, in pursuance of the appeal heretofore allowed in this cause, and include therein the following:

The bill of complaint of the plaintiff, with Exhibit A filed therewith;

Notice of motion for temporary restraining order and interlocutory injunction;

Subpoena in equity, with return;

Order filing bill of complaint, noting motion for interlocutory injunction, granting temporary restraining order, assembling three-Judge Court, and continuing action thereon;

Bond given upon obtaining temporary restraining order;

Order substituting Ernest K. James for Fred L. Fox, as defendant;

Order filing "Motion of Ernest K. James, individually and in his official capacity as Acting Tax Commissioner of the State of West Virginia, to dismiss plaintiff's bill of [fol. 109] complaint," and "Defendant's motion to dismiss plaintiff's bill of complaint," and "The answer of the defendant, Ernest K. James, individually and in his official capacity as Acting Tax Commissioner of the State of West Virginia";

Motion of Ernest K. James, individually and in his official capacity as Acting Tax Commissioner of the State of West Virginia, to dismiss plaintiff's bill of complaint;

Defendant's motion to dismiss plaintiff's bill of complaint;

Answer of defendant, Ernest K. James, individually and in his official capacity as Acting Tax Commissioner of the State of West Virginia;

Order filing stipulation;

Stipulation of Facts;

Final decree awarding permanent injunction;

Findings of fact, conclusions of law and opinion of the Court;

Notice of application for appeal and acknowledgment of service thereon;

Petition for appeal to the Supreme Court of the United States, and acknowledgment of service thereon;

Assignment of errors accompanying petition for appeal, and prayer for reversal contained therein, and acknowledgment of service thereon;

Statement of defendant (appellant), disclosing points upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the decree in question, and acknowledgment of service thereon;

Notice to plaintiff (appellee), calling attention to provisions of Paragraph 3, Rule 12, Rules of the Supreme Court, with acknowledgment of service thereon;

Order allowing the appeal, granting a supersedeas, and approving the cost and supersedeas bond, with acknowledg- [fols. 110-137] ment of service thereon;

Cost bond, with approval of court endorsed thereon;

Citation, with acknowledgment of service thereon;

All orders of the court, filing pleadings, or otherwise, made with reference to the cause, and not specifically mentioned therein;

This praecipe, with acknowledgment of service thereon, and approval of same by counsel of record for plaintiff (appellee) endorsed thereon.

Please certify the same to the Supreme Court of the United States under your seal and in accordance with the rules of said Court and with the laws of the United States relating to such appeals.

Clarence W. Meadows, Attorney General of West Virginia; W. Holt Wooddell, Assistant Attorney General; Forest B. Poling, Assistant Attorney General, Counsel for Appellant.

Dated this 21st day of May, 1938.

The undersigned attorneys of record for the Appellee in the above-entitled cause, hereby acknowledge service of the above Praecipe, and approve the same, this 21st day of May, 1938.

E. W. Knight, R. G. Kelly, Attorneys for Appellee.

[fols. 138-139] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 140] In Supreme Court of the United States

Statement of Points to Be Relied Upon—Filed July 14, 1938

Comes now the appellant in the above-entitled cause and states that the points upon which he intends to rely in this Honorable Court in this case are as follows:

Point I

Appellee is engaged within the State of West Virginia in the business of collecting incomes from the use of real or personal property, or an interest therein, whether by lease, conveyance or otherwise, and whether the returns be in the form of rents, royalties, fees, interests or otherwise.

Point II

The business of the appellee in the State of West Virginia is purely local and intra-state, any interstate character of appellee's business having ceased when its films arrived in West Virginia, and the package in which they were contained was broken so that thereafter any use of said films and the income derived therefrom in the State of West Virginia is a purely intra-state activity and hence taxable by said State.

[fols. 141-142] Point III

Any part of appellee's activities with respect to its business in West Virginia, in the exhibition of its films, which might be said to be in interstate commerce is purely incidental to the local performance of its activities in West Virginia. That for which the appellee received its rentals

and fees was an activity purely local in character, carried on entirely within the State of West Virginia.

And the appellant further adopts and will rely upon the assignments of error filed with his petition for appeal on May 21st, 1938.

Dated this 21st day of May, 1938.

Clarence W. Meadows, Attorney General of West Virginia; W. Holt Wooddell, Assistant Attorney General; Forest B. Poling, Assistant Attorney General, Counsel for Appellant.

Service of a copy of the foregoing statement of points is hereby acknowledged on behalf of the appellee, this the 21st day of May, 1938.

E. W. Knight, R. G. Kelly, Counsel for Appellee.

[fol. 143] In Supreme Court of the United States

[fol. 144] Stipulation of Parts of Record Necessary for Consideration of Case—Filed July 14, 1938

Appellant and Appellee agree that in their opinion the entire record as filed is necessary for the consideration of the case and needs to be printed by the clerk for the hearing thereof.

Dated this 21st day of May, 1938.

Clarence Meadows, Attorney General of West Virginia; W. Holt Wooddell, Assistant Attorney General; Forest B. Poling, Assistant Attorney General, Counsel for Appellant. Clarence W. Meadows, Counsel for Appellant. R. G. Kelly, Counsel for Appellee.

[fol. 145] [File endorsement omitted.]

Endorsed on cover: File No. 42,646. S. West Virginia, D. C. U. S. Term No. 161. Ernest K. James, Individually and in his Official Capacity as Acting Tax Commissioner for the State of West Virginia, appellant, vs. United Artists Corporation. Filed June 30, 1938. Term No. 161, O. T., 1938.